No. 2691.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Security Trust & Savings Bank, a corporation, as Trustee in Bankruptcy of Fielding J. Stilson Company, a corporation, bankrupt,

Appellant,

vs.

Wm. R. Staats Company, a corporation, and Title Insurance & Trust Company, a corporation,

Appellees.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

This case comes before this court upon an appeal from a judgment of dismissal entered in the United States District Court for the Southern Division of the Southern District of California (Oscar A. Trippet, judge).

The Fielding J. Stilson Company, a corporation, organized under the laws of the state of California, was adjudged a bankrupt on the 24th day of October, 1912, upon an involuntary petition filed on July 2nd, 1912. On the 19th day of March, 1912, the bankrupt Fielding J. Stilson Company conveyed to the Title Insurance & Trust Company lot seventeen (17) in block nine (9) and other lots in Angeleno Heights in the city of Los Angeles as security for an indebtedness amounting to $3870.00 due from said bankrupt to Wm. R. Staats Company, a corporation. By the finding of the Special Master, which finding was affirmed by the District Court, the bankrupt was at the time of the giving of said trust deed insolvent. A bill of complaint in equity was filed in said District Court on the 22nd day of January, 1913, wherein it was alleged, among other things, that the transfer to the Title Insurance & Trust Company for the benefit of Wm. R. Staats Company was an unlawful preference and the complainant prayed that the deed, transfer and conveyance be vacated, set aside and declared void and that neither of the said defendants has any right, title, interest, estate, claim or lien in or to the real property conveyed to the Title Insurance & Trust Company. [See bill of complaint, page 4 of transcript.]

Thereafter the defendants filed their answer to the bill of complaint. [Transcript, page 22.] A motion was made to refer the issues to a Special Master and a notice of this motion was duly given to the defendants. [Transcript, page 29.] Objections were made by the defendants to the reference to the Special Master, which were overruled and the issues were referred

to Lynn Helm, Esq., as Special Master to hear the issues raised and report the same to the court with his findings of fact and conclusions of law thereon. [Transcript, page 32.]

Lynn Helm, the Special Master appointed to hear the issues, heard the evidence [transcript, pages 109 to 221], and thereafter reported his findings of fact and conclusions of law thereon to the District Court. [Transcript, pages 33 to 54.] The Special Master found that on the 19th day of March, 1912, at the time of the giving of the alleged preference, the Fielding J. Stilson Company was insolvent; that the giving of this security for an antecedent indebtedness enabled the Wm. R. Staats Company to obtain a greater percentage of its claim against the bankrupt than other creditors of the same class, and that the bankrupt was guilty of giving a preference by the giving of such security; that the Wm. R. Staats Company had reasonable cause to believe that it was intended by the giving of said security to give a preference and that the said trust deed so given was voidable at the instance of the trustee in bankruptcy. As conclusions of law he found that the transfer should be set aside, cancelled and annulled.

Thereafter the defendants filed their exceptions to the report of the Special Master. [Transcript, pages 55 to 60.] Upon the hearing of these exceptions the court overruled the defendants' first and fourth exceptions to the findings of the Special Master. The first exception overruled was that the case had been improperly referred to a Special Master, and the fourth exception overruled was that the Fielding J. Stilson

Company was at the time of the giving of the alleged preference insolvent. It will not be necessary for the appellant to argue either of these points as they stand approved, both by the Special Master and the District Judge. The District Judge, however, sustained the second exception to the finding that the enforcement of the trust deed had the effect of enabling the Wm. R. Staats Company to obtain a greater percentage of its debt than other creditors of its class and it was voidable at the option of the trustee. He also sustained the third exception to the finding that the trust deed was executed to secure an antecedent indebtedness. He also sustained the fifth exception to the finding that there was positive evidence that the sixty shares of stock referred to in the Special Master's findings had been hypothecated by the bankrupt corporation prior to the execution of the deed of trust. He also sustained the sixth exception to the finding that the effect of the deed of trust was to enable the defendant Wm. R. Staats Company to get a greater percentage of its claim than other creditors of the same class. This exception, however, was the same as the second exception to the report. He also sustained the seventh exception to the finding of the Special Master that the Wm. R. Staats Company, at the time of the execution of the deed of trust, had reasonable cause to believe that a preference was thereby intended. The ninth exception, which was an exception to the admission or exclusion of testimony, was not ruled upon by the District Judge.

The questions to be determined in this case, therefore, are whether under the evidence the trust deed

given to Wm. R. Staats Company was for an antecedent indebtedness and not for a present valuable consideration; and whether the Wm. R. Staats Company had reasonable cause to believe at the time it received the trust deed that it was receiving a preference.

Errors Relied Upon by Appellant Upon This Appeal Are As Follows:

First: In sustaining the exception of the defendants to the finding of the Special Master that the deed of trust therein referred to constituted a preference and that the effect of the enforcement of such transfer was and is to enable the defendant Wm. R. Staats Company to obtain a greater percentage of its debt than other creditors of the said bankrupt of the same class and was and is voidable at the option of the trustee in bankruptcy.

Second: In sustaining the exception of the defendants to the finding of the Special Master that the deed of trust was executed to secure an antecedent indebtedness and that the transaction between the Fielding J. Stilson Company, a bankrupt, and Wm. R. Staats Company was not a single transaction.

Third: In sustaining the exception of the defendants to the finding of the Special Master that sixty shares of stock mentioned in the report had been hypothecated by the bankrupt corporation prior to the execution of the trust deed.

Fourth: In sustaining the exception of the defendants to the finding of the Special Master that the Wm. R. Staats Company at the time of the execution of

the deed of trust had reasonable cause to believe that a preference was thereby intended.

Fifth: In sustaining the exception of the defendants to the finding of the Special Master that the transfer was voidable by the trustee and should be set aside, cancelled and annulled and ordering a dismissal of the bill.

Did the Transfer from Fielding J. Stilson Company to The Title Insurance & Trust Company for the Benefit of Wm. R. Staats Company Constitute a Preference.

The finding of the Special Master that at the time this transfer was made the Fielding J. Stilson Company was insolvent and the admission of the defendants in their answer as follows:

"Defendants admit that on the 19th day of March, 1912, defendant Wm. R. Staats Company was a creditor of said Fielding J. Stilson Company in and for the sum of $3870.00,"

together established a preference, that is, that the payment to Wm. R. Staats Company enabled it to receive a greater percentage than the other creditors, unless the securing of the Wm. R. Staats Company was in exchange for a present valuable consideration. This was the contention made before the Special Master and before the District Judge by the defendants in this action. The contention was overruled by the Special Master and was sustained by the District Judge. It will, therefore, be necessary to consider this question first.

The findings of fact on this question made by the Special Master cannot be controverted. "The bankrupt and the defendant Wm. R. Staats Company were brokers dealing in stocks, bonds and other securities and each of them was represented upon the Los Angeles Stock Exchange. [Transcript, pages 148 and 149.] On the 15th day of March, 1912, the bankrupt in due course of business purchased of the defendant Wm. R. Staats Company two hundred shares of stock of the Amalgamated Oil Company at $64.50 per share. The defendant Wm. R. Staats Company delivered certificates representing sixty shares and gave a due bill for one hundred and forty shares for subsequent delivery. The sale was a cash transaction and the bankrupt gave its check to Wm. R. Staats Company on that date payable at the Citizens National Bank of Los Angeles for $12,900.00, the cash value of the stock purchased. This check upon presentation to the Citizens National Bank was dishonored and rejected for want of funds. Immediately upon the rejection of the check on the 16th day of March, 1912, John E. Jardine, an officer of the Wm. R. Staats Company, telephoned Fielding J. Stilson, president of the bankrupt corporation, in reference to this check and its rejection and was advised by him that the check would be made good and for him to put it through the bank again the following banking day. It was put through on the following Monday, the 18th day of March, 1912, but was again rejected for want of funds. Again Stilson asked Jardine to put the check through the bank a third time and it was again rejected for want of funds. Mr. Stilson then told Mr. Jardine

that he was making disposition of some property and expected a payment of $10,000.00 and that he would protect Wm. R. Staats Company. On the following day, the 19th, Mr. Stilson advised Mr. Jardine that he could not meet the payment, that the deal from which he expected funds was not consummated, but that the Fielding J. Stilson Company had some real estate and would give them security thereon. Thereupon one of the defendant's employees went with Mr. Stilson to examine the property offered as security, which Mr. Stilson estimated was of the value of $25,000, and it was accepted and a trust deed was given that afternoon to the Title Insurance & Trust Company for the benefit of Wm. R. Staats Company to secure it in the sum of $3870.00, the value of the sixty shares of stock of the Amalgamated Oil Company sold and delivered to the bankrupt as aforesaid, and was placed of record upon the following morning, March 20th, 1912, at nine o'clock a. m. That morning the bankrupt suspended and has transacted no business since that day." Testimony of Fielding J. Stilson. [Transcript, pages 150 to 166.] Testimony of John E. Jardine. [Transcript, pages 188 to 193.]

On the foregoing facts we submit that the findings and decision of the Special Master are absolutely conclusive and that no other findings than the ones he made are possible under these circumstances. We quote these findings as follows:

"It is contended on behalf of the defendant William R. Staats Company that the transaction between it and the bankrupt was a cash transaction; that upon

the failure of the bankrupt to pay its check, which was given for the stock received, that the defendant William R. Staats Company had a right of rescission and that the waiver of this right of rescission was present consideration for the taking of the transfer from the defendant, and that the transfer was in fact only security for a then present loan.

These contentions of the defendant cannot be upheld for it cannot be said that this transfer was not a diminution of the bankrupt's estate, nor that the transaction should be regarded as instantaneous and one. The right of rescission on the part of the defendant William R. Staats Company, with the right to the return to it of the certificates for the 60 shares of stock which it had on the 15th of March, 1912, delivered to the bankrupt, is predicated upon either that the seller retains the stock sold, or the ability on the part of the bankrupt to return the 60 shares of stock, otherwise William R. Staats Company would only have a general claim against the Fielding J. Stilson Company for the value of the stock and it would in effect to that extent be a general creditor of the bankrupt.

Otherwise, also, the right of rescission would not be an asset in the hands of William R. Staats Company, but would result in a lawsuit which might inevitably be a liability.

There is no testimony in this case that at any time after the 15th of March, 1912, Fielding J. Stilson Company had undisposed of 60 shares of stock which it received from William R. Staats Company on that date, but on the contrary there is positive testimony that the due bill for 140 shares of stock and the other 60 shares immediately on its receipt had been hypothecated by the Fielding J. Stilson Company, so that if William R. Staats Company had attempted to rescind it would not have been in any position to have re-

acquired the stock which it sold and delivered to the bankrupt.

William R. Staats Company consented to give the Fielding J. Stilson Company time to obtain the money from other sources and retained no lien upon the stock which it had sold it. Its consent in this respect, even if not intended to have that effect, broke the continuity of the transaction and made the stock or its proceeds part of the general assets of the bankrupt's estate."

Before proceeding further it will be necessary to dispose of one of the exceptions to the findings of the Special Master, which exception was sustained by the District Court. This was the fifth exception to the finding that the sixty shares of stock had been hypothecated by the bankrupt corporation prior to the execution of the trust deed.

The testimony is uncontradicted that the Fielding J. Stilson Company did no business whatever between the 19th day of March, 1912, and the date of the filing of the petition in bankruptcy. [Transcript, pages 120, 121, 218, 219.] The schedule in bankruptcy produced in evidence contained the following statement:

"Fielding J. Stilson Company purchased 200 Amalgamated Oil at 64½ from Wm. R. Staats Co. The check in payment was dishonored. The Staats Co. delivered 60 shares and gave bankrupt a due bill for balance of 140 shares, valued at $8400.00. The bankrupt then borrowed money from A. L. Jameson, giving as security the 60 shares of Amalgamated Oil and the due bill of the Staats Co. for 140 shares. The 60 shares were sold." [Transcript, pages 102 and 103.]

The testimony of Fielding J. Stilson upon this subject, and referring to this entry in the schedules, was as follows:

"Q. You scheduled 140 Amalgamated Oil, $8400.00, was that the stock which was purchased from the Staats Company which is the subject of this litigation? A. It is.

Q. You scheduled the stock as belonging to you at that time? A. The corporation, yes.

Q. It had been hypothecated, had it? A. According to the statement, 60 shares and a due bill, making 200 had been hypothecated.

Q. So that this asset would be offset by a corporation liability? A. It would." [Transcript, page 136.]

The testimony of Mr. Stilson already referred to [pages 150 to 167] shows that the trust deed was executed at 4:30 p. m., March 19th, 1912, and was recorded at nine o'clock a. m. on March 20th, 1912. On the 20th day of March, 1912, the public prints of Los Angeles were all of them full of the difficulties of the Fielding J. Stilson Company and Mr. Jardine admitted knowing this fact. [Transcript, page 206.]

It, therefore, must be held that the finding of the Special Master that this stock had been hypothecated on or before March 19th, 1912, stands uncontradicted and no other finding was possible. No attempt was made by the defendants to prove or to show by anybody that at the time the trust deed was executed the Fielding J. Stilson Company had possession or control of the stock which Mr. Stilson testified was hypothecated.

There is no testimony in the record anywhere that

the Wm. R. Staats Company ever demanded from the Fielding J. Stilson Company the shares of stock which it had sold to it. There is absolutely no testimony in this record that any offer of rescission was ever made by the Wm. R. Staats Company or that it ever contemplated rescinding this transaction. Throughout the entire deal the Wm. R. Staats Company confirmed the sale to Fielding J. Stilson Company. In other words, it accepted a check in payment and when this check was dishonored instead of requiring the return of its stock it voluntarily gave the Fielding J. Stilson Company credit and put the check through again and again and again and then took security for its debt at a time when the Fielding J. Stilson Company had quit business, the evening before it was suspended on the Stock Exchange, and at a time when the Wm. R. Staats Company knew there were other dishonored checks of Fielding J. Stilson Company outstanding. [Transcript. pages 148, 166 and 167.]

Mr. Stilson testified that on the 12th or 13th day of March, 1912, the corporation found itself in financial difficulties by reason of the fact that about $20,000 of their outstanding checks had been presented at the bank and refused payment for insufficient funds. [Transcript, pages 147, 148.] The transaction with the Wm. R. Staats Company occurred on March 15th, 1912 [transcript, page 221], and when its check was returned unpaid Mr. Jardine and Mr. Coggeshall went to the office of the Fielding J. Stilson Company. The following conversation occurred there:

"Q. (By Mr. Tuller): State what you said. A. Mr. Coggeshall asked if I had other items and I said I did; that is, I had other checks that had been turned down. I assured them at that time that I would do everything to protect them.

Q. Did you at that time tell them how many checks had gone bad? A. I believe I did.

Q. Do you remember anything further that was said at either of these conversations? A. My recollection is that they said they would wait until tomorrow, give me another day, extend the time for making good the check.

Q. Was anything said at either of those conversations by you as to how you would make good? A. Yes.

Q. Well, state what was said. A. I had made a tentative transaction for the sale of some real estate. * * * I told them I had made a tentative proposition which would bring me $10,000.00 cash and that I would, upon receiving this money, which I expected the next day, take care of their item first.

Q. Do you remember when you next saw anybody connected with the Wm. R. Staats Company? A. I believe it was the following Tuesday, the 19th of March, 1912.

Q. Did you not see anyone connected with the Staats Company between those dates? A. It was possible I did.

Q. Did you mean the following day when you said Tuesday? A. I meant the following day. As I remember, I called at Mr. Jardine's office.

Q. State what was said then. A. I—as I remember, I said to Mr. Jardine that I had not yet received the $10,000 and that I felt uncertain as to the immediate future for the reason that I had been advised that my transaction had failed of consummation. That

information was conveyed to me Monday evening late, and on Tuesday I called at Mr. Jardine's office.

Q. What did he say? A. Something as to how I could meet it or what I was going to do about it, and I said I would do everything within my power to protect them and proposed to give them collateral in the nature of equities upon certain real estate of the corporation. Mr. Staats said to me that he thought that would be all right if the equity was as represented. Mr. Coggeshall was there, either called into the conversation or was there, I am not certain, but the arrangement was made between Mr. Coggeshall and myself to inspect this property and an appointment agreed upon to go that afternoon."

In pursuance of the foregoing arrangement, the parties went to the property and the alleged preference was consummated. This testimony is not contradicted. It certainly shows that after the check had been dishonored, further credit was given on three different occasions, and finally after being informed that it was impossible to pay the cash, the security was taken for the debt.

> "Where bankrupts, who were stock brokers, obtain from defendant banks at the beginning of the banking hours, day or clearance loans and later in the same day when bankrupts were insolvent and the banks had reasonable cause to believe them to be so, delivered to the banks upon demand a large amount of collaterals as security, the transactions constituted preferences and the securities were recoverable by bankrupt's trustee."
>
> Hotchkiss v. National City Bank, 201 Fed. 664.

The foregoing case was affirmed by the Supreme Court of the United States and this case, cited below, is referred to in the report of the Special Master [transcript, pages 46 and 47] as being similar to the one at bar.

National City Bank v. Hotchkiss, 231 U. S. page 50:

"It is the date of the actual transfer that governs; and the fact that the transfer was in fulfillment of an agreement which itself was based on a valuable consideration passing between the parties previously will not cause the transfer to relate back to the time of the passing of the original consideration to make it a transfer on a presently passing consideration. It is a transfer on a pre-existing obligation; and may, if the other elements co-exist, constitute a preference."

Remington on Bankruptcy, 2nd Edition, Sec. 1326¼.

The length of time during which credit is given is immaterial. In the National City Bank cases the credit was given from ten o'clock in the morning to three o'clock in the afternoon when the payment was made which constituted a preference. This is particularly so in stock brokers' transactions. While it might seem hard that the stock of Wm. R. Staats Company should be taken in the manner in which it was engulfed in this failure, due consideration must be given to the other creditors whose property was engulfed, whose checks were repudiated and whose money was lost in the various transactions as shown by the schedules of this bankrupt. The finding of the Special Master

shows the liabilities of this bankrupt to be in excess of $250,000. However innocent the intention of the Wm. R. Staats Company in its original conception, the moment that it found that its confidence had been misplaced and it consented to convert the wrong into a debt for which it took security, it then committed a wrong so far as the other creditors of this bankrupt were concerned and took unto itself a part of the property which rightfully should belong to all of the creditors. Doubtless, it was pursuing the maxim, *lex vigilantibus non dormientibus subvenit.* This maxim, however, has no application to those who deal with insolvents.

We again submit that the statement of the Special Master in his report [Transcript, pages 49 and 50] is an absolutely correct statement of the facts in this case:

"The continuity of the transaction was broken when the defendant Wm. R. Staats Company agreed to wait for its money, and put the check through the second time and third time, and when it afterwards agreed to wait for the bankrupt to obtain funds from another deal or from other property, and when in fact it allowed the stock which it sold to the bankrupt to so far pass out of its hands that it could not reach forth and obtain it upon any rescission of the transaction. Thereafter it became a general creditor of the bankrupt. No doubt by its selling the stock to the Fielding J. Stilson Company it increased its estate, but so have many general creditors by their advances or transactions with the bankrupt. While the defendant may have taken the mortgage in lieu of cash, it was the security for an antecedent indebtedness absolutely due and owing from the Fielding J. Stilson Company to the defendant prior to the giving of the security. * * * A loan pre-

supposes a new and present advancement to the borrower. It means the advancement of ready funds or property whereby the estate of the bankrupt would be increased at that time to the amount of the loan or to the amount of the actual cash advanced at that time. A loan is not the security or payment of an antecedent indebtedness as was the condition here presented. * * * The giving of this security by the defendant when it was insolvent, as security for an antecedent indebtedness, due by it, had necessarily the effect of giving the defendant, the Wm. R. Staats Company, a greater percentage of its claim against the bankrupt than other creditors of the same class, and it must therefore be held that the bankrupt gave a preference by the giving of said escurity to said defendant."

Did the Defendant Wm. R. Staats Company Have Reasonable Cause to Believe, when it Received the Security, that it was Intended Thereby to Give a Preference.

It being found by the Special Master and confirmed by the District Court that the Fielding J. Stilson Company was insolvent when the payment was made to the Wm. R. Staats Company, and it having been shown that the payment to the Wm. R. Staats Company was of an antecedent indebtedness and, therefore, that such payment necessarily enabled the Wm. R. Staats Company to obtain a greater percentage of its debt than other unsecured creditors, the only remaining question to be determined in this action, in order to enable the plaintiff to recover, is to establish the fact that the Wm. R. Staats Company at the time it received this payment did have reasonable cause to believe that it

was obtaining a preference. We have no doubt at all but what the District Judge would have sustained the Special Master on this question if he had not found in favor of the defendants upon the question of the security being given for an antecedent debt. In other words, when the District Judge came to the conclusion that the purchase of the stock by the Fielding J. Stilson Company and the giving of the checks and the security constituted all one transaction, or at least that there was a present consideration passing from the Wm. R. Staats Company to the Fielding J. Stilson Company for the security, then the District Judge was necessarily forced to find that the Wm. R. Staats Company did not have reasonable cause to believe that it was getting a preference.

We have detailed some of the testimony to the effect that the Wm. R. Staats Company when its check was returned for want of funds put its check through the bank twice more and each time it was returned and that the Wm. R. Staats Company was informed that there were $20,000 of checks that had been rejected by the bank and that the Fielding J. Stilson Company had then assured the Wm. R. Staats Company that they would be protected by security. It is true that Mr. Jardine testified that he had no recollection of the conversation in relation to the $20,000 checks. The Special Master, however, finds as follows [transcript, page 51]: "Mr. Jardine does not contradict this statement except by his statement that he has no recollection that Mr. Stilson so told him, and I must therefore find that the defendant Wm. R. Staats Company not only knew that the check given them had been rejected, but

that they had notice that other checks of the bankrupt were outstanding which had been rejected for the same reason of want of funds. These circumstances were sufficient to put a reasonably prudent man upon inquiry." In addition to this it was proven that Mr. Jardine was a member of the Stock Exchange of which Fielding J. Stilson was a member, and that Stilson was suspended on that board on March 20th, 1912. [Transcript, page 149.]

We have already called attention to the fact that the trust deed was executed on March 19th, 1912, at 4:30 o'clock p. m.

Any reading of the testimony relating to the manner in which this security was given must lead any man to the conclusion of the absolute haste with which this security was procured. In other words, the Wm. R. Staats Company was so thoroughly convinced of the financial difficulties of the Fielding J. Stilson Company that on the 19th day of March, 1912, when the check was finally turned down and they accepted the proposition for security, they sent their representative, Mr. Coggeshall, with Fielding J. Stilson in an automobile and they inspected between six and a dozen pieces of property, all of which Mr. Stilson had informed Mr. Jardine were subject to a first mortgage. Mr. Jardine suggested the giving of a trust deed upon the mortgaged property. They returned to the office of Wm. R. Staats Company at about half past four in the afternoon and at the suggestion of Mr. Coggeshall of the Wm. R. Staats Company they went to the Title Insurance & Trust Company at Los Angeles and reached there at twenty minutes to five o'clock. Some clerk in

the Title Insurance & Trust Company then prepared the deed of trust and the note. [Transcript, pages 156 to 160.] Another important fact is that the Wm. R. Staats Company did not take security for the full amount of the $12,900 represented by the check, but they repudiated their due bill for 140 shares and took security only for the sixty shares. [Transcript, page 161.] Nothing whatever was said about an abstract or certificate of title to the property. Mr. Stilson was asked the question:

"Q. After it was prepared was anything said about an abstract or certificate of title by anybody? A. No, except my statement that I made to them that the property was covered by those mortgages. I didn't offer any certificate. They didn't ask for one.

Q. Was any abstract or certificate demanded of you to show the title to the property? A. No." [Transcript, page 162.]

After the trust deed had been prepared it was necessary to get Fielding J. Stilson's brother, Carroll Stilson, the secretary, to sign and place the seal upon it, which was done, and the instruments were delivered to the Wm. R. Staats Company. The instrument is attached to the bill of complaint as Exhibit "A" and is found on pages 8 to 19 of the transcript. The recording date was March 20th, 1912, at nine a. m. The note was payable one day after date. Mr. Jardine was not very frank in his answers with relation to his knowledge of the financial condition of the Fielding J. Stilson Company. For instance, on cross-examination the following question was asked him with relation to information that might have been given to him by Mr.

Brooks, a representative of Wm. R. Staats Company on the Stock Board:

"Q. Had Mr Brooks prior to the 19th day of March, 1912, informed you of any rumors upon the Stock Exchange with relation to the affairs of the Fielding J. Stilson Company? A. I cannot remember."

We have already shown that the Fielding J. Stilson Company was suspended on March 20th, 1912, and that Mr. Jardine on that day knew that the public prints of Los Angeles were filled with the reports of the failure of this concern. It is not to be wondered at that the Special Master was of the opinion that a company consummating a transaction with the haste of this transaction and with the knowledge of the financial difficulties that had already overtaken the Fielding J. Stilson Company, was not pursuing an innocent course devoid of all notice and knowledge of what was impending. The fact alone that a stock broker's checks were outstanding to the amount of $20,000 repudiated by the banks would be sufficient to put even the most unsophisticated person upon notice that the broker was indeed "broke" and that his financial failure was a matter of hours. Any other conclusion would seem utterly impossible.

As we have already said, we are of the opinion that the District Judge, if he had not been of the opinion that this security was part of one transaction, would have sustained the Special Master's findings as follows:

"I therefore find that said bankrupt having given a preference, that William R. Staats Company receiving the same and having benefited thereby, had reasonable

cause to believe that it was intended by the giving of said security to give a preference and that the said trust deed so given is voidable at the instance of the trustee in bankruptcy." [Transcript, page 53.]

"In an action by a trustee to recover an alleged preference, payments to a creditor made within the four months period, reasonable cause to believe that a preference was intended does not require proof that defendant had either actual knowledge or actual belief as to insolvency of the bankrupt at the time of the payment, but only of such surrounding circumstances as would lead an ordinarily prudent business man to conclude that a preference was intended."

Sundheim v. Ridge Avenue Bank, 138 Fed. 951;
R. H. Herron Co. v. Wm. H. Moore, Jr., 208 Fed. 134 (C. C. A. 9th Ct.);
In re Dorr, 196 Fed. 292 (C. C. A. 9th Ct.);
In re Thomas Deutschle & Co., 182 Fed. 435.

"Where a creditor, about to receive a payment or security from his debtor, has knowledge or notice of facts which would incite a man of ordinary prudence and business intelligence to inquire as to a debtor's solvency and the probable effect of the transaction as a preference, he is bound to prosecute a reasonably diligent inquiry to ascertain the truth; and if he fails to do so, he is chargeable with knowledge of the facts which such an inquiry would have disclosed. * * * In fact, 'reasonable cause to believe' in the Bankruptcy Act, covers substantially the same field as 'notice' in determining whether a person is a *bona fide* purchaser of property."

Black on Bankruptcy, Sec. 599.

"Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop."

Coder v. McPherson, 152 Fed. 951 (C. C. A. 8th Ct.);

Pittsburg Plate Glass Co. v. Edwards, 148 Fed. 377 (C. C. A. 8th Ct.);

Tilt v. Citizens Trust Co., 191 Fed. 401;

Collier on Bankruptcy, p. 820;

Remington on Bankruptcy, Secs. 1396, 1397, 1398, 1400, 1401 and 1402;

Ogden v. Reddish, 200 Fed. 977.

It is respectfully submitted that where there was any conflict in the testimony the findings of the Special Master must be taken as giving the true facts. In other words, the facts as found by the Special Master should be accepted by this court, and doubtless were by the learned District Judge. The only question to be determined by the District Court was whether from the facts found by the Special Master the plaintiff was entitled to recover.

"The findings of fact by the Special Master will not be reversed, except upon clear and convincing proof of error."

Remington on Bankruptcy, Sec. 2634;

In re Harr, 143 Fed. 421;

Southern Pine Co. v. Savanah Trust Co., 141 Fed. 802 (C. C. A. 5th Ct.);

Camden v. Stuart, 144 U. S. 104.

As to the findings of fact of the Special Master, which were approved by the District Judge, it is submitted that they will not be inquired into by this court.

> "The Master and the court below concurred in the findings of facts, and when that is the case, this court will not reverse or modify unless a very plain mistake is definitely pointed out."
>
> Buckingham v. Estes, 128 Fed. 584.

It is respectfully submitted that the order of the District Court sustaining the exceptions to the Special Master's report and dismissing the bill should be reversed and that the exceptions to the report should be overruled and judgment ordered on the report of the Special Master, in favor of the complainant.

W. T. Craig,
Solicitor for Complainant.